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EPILOGUE

IN SPITE OF THE LAW: A SOCIAL COMMENT ON THE IMPACT OF KENNERLY AND CROW TRIBE

by John L. Schwechten*

INTRODUCTION

The recent court decisions concerning Indian credit and mortgage loans (*Kennerly v. District Court* and *Crow Tribe of Indians v. Deernose*)¹ raise issues of incontestable importance. The legal community, the lending institution, the reservation merchant, and the Indian, each in his own right reacted with reasonable concern and fear that these decisions might lead to a drying up of credit and loans to Indian customers. The concern seems justified. During the course of this writer's investigation some individuals expressed certainty that unless corrective action is taken, this increasing inability of the Indian to secure adequate credit to meet his needs will result in his being reduced to a second-class citizen.

Evidence, although still sketchy, would seem to bear out this prediction. Already, Production Credit Associations, (P.C.A.), which have long been established financial institutions in Indian agriculture, have established a policy effectively curtailing new loans to Indians until provisions can be made to enforce the liens which must be taken. The following material provides evidence that some banks as well as private creditors, like automobile dealers, grocery retailers, gas stations and certain reservation mercantile dealers, might be moving in this same direction.

THE CROW INDIAN RESERVATION: THE PROBLEM

A sampling survey conducted on the Crow Indian Reservation and in the adjacent town of Hardin, Montana in November, 1971² adds authority to the claim that the *Kennerly* and *Crow Tribe* decisions have affected Indian credit and mortgage loans. The local Production Credit Association, unique among the area's lending institutions, found its position especially compromised by the *Crow Tribe* decision. This agency is precluded by statute from utilizing the federal courts. With *Crow Tribe* blocking access to the state courts, the PCA had to choose between two alternatives: (1) rely on the tribal courts to enforce loans and

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¹The preceeding student notes consider these decisions in detail.

²Survey and interviews referred to were conducted at Crow Agency and Hardin, Montana, November, 1971. All references to the 'tribe', the 'area', or the 'reservation' pertain to the Crow Tribe of Indians and to the Crow Indian Reservation of south-central Montana. Generalizations to other tribes or other areas are not intended or implied, irrespective of possible coincidental circumstances.

mortgages; or (2) establish a policy of curtailing new loans to Indians. It chose the latter.

The local banks as well as the Farmers Home Administration (F.H.A.) and the Bureau of Indian Affairs (B.I.A.) are, of course, not limited to state courts and were not forced to re-establish policy on the basis of *Crow Tribe*. The F.H.A. and the B.I.A., as entities of the federal government, use the federal courts as a matter of course. However, the banks differ in that they have traditionally relied on the state courts; a self-directed and longstanding reliance. As a consequence, some movement toward limiting mortgage loans to Indians has resulted. While the banks are confining such loans both in the amount of money loaned and in the number of loans granted, they are stressing that character loans to creditable and reputable Indians are being made essentially as they were in the past.

Automobile credit sales have likewise suffered. Only one Hardin dealership is able to finance such sales itself. Ordinarily, the banks would handle some automobile financing by taking land liens as collateral. Since *Crow Tribe* precludes their using state courts to enforce these liens, the banks have hesitated to initiate new financing contracts.

These examples seem to affirm the notion that *Crow Tribe* has seriously impeded normal financial transactions between the Indian and the lending institutions. Whether by statute or policy, these institutions have relied on the state courts. They now find themselves in want of a legal forum.

Although it preceded the *Crow Tribe* decision by a matter of months, *Kennerly's* impact at the grassroots level is still unclear. The new policies that evolved from the *Crow Tribe* statement on mortgage loans came on the heels of that decision. At this writing, the *Kennerly* decision apparently has not been met with similar policy reformulations. Yet, much of the reservation merchants' business is established on credit sales. If the merchant cannot depend on secure and enforceable credit transactions with his Indian customers, one might well worry about the long-term effects of such a situation. Indeed, it was suggested that this dilemma might result in an "impacted area" where everyone, not just the Indian, is relegated to second-class citizenship. The logic behind this position is that in order for the merchant to recover losses due to Indian forfeitures on payments, prices on all goods and services might go up, thereby affecting all residents in a given area.

The possibility of the creation of an impacted area is not without foundation. But it is only part of a larger issue. Some people are less able to escape undesirable situations than others. This is predicated on any number of conditions not the least of which is one's socio-economic status. People from the poverty community are less mobile. They are less able to avoid objectionable conditions than are those with more established means. It is a condition of few or no options that tends to

perpetuate poverty, especially in rural areas where avenues of escape are so few. Thus, while it is true that an area might become "impacted" as a result of *Kennerly*, it is also true that many people, especially the majority of middle-class non-Indians, can go elsewhere to do their buying while the less affluent (in most reservation areas, the Indians) cannot.

IN SPITE OF THE LAW: A PRACTICAL SOLUTION?

As a result of *Kennerly*, the reservation merchant can no longer look to the state courts for help in enforcing credit transactions with his Indian customers. Given this stricture, one might wonder about a merchant's motives for continuing his credit practice. Certainly a case can be made for the proposition that his livelihood is established on this kind of trade. Further, his economic security is dependent on his ability to deal effectively with a new situation. But often his ability to deal effectively with the situation is dependent on his ability to deal on his own terms, irrespective of the law. There are two reasons for this:

(1) Although *Kennerly* and *Crow Tribe* have contributed to the problem, Indians have always been, to some extent, treated as second class citizens both on and off their reservations.

(2) The fact that *Kennerly* and *Crow Tribe* reached the courts in the first place suggests that the issues they deal with have been a part of reservation life for some time.

These issues were as real years ago as they are today. The merchant, whether he is a grocer, appliance dealer, or gas station operator, has had to depend on his own resources in lieu of a well-defined and comprehensive legal system. The tribal court is not a court of record and lacks appellate procedures. While the non-Indian merchant was never comfortable with the possibility of using the tribal court, he now finds as a result of *Kennerly* and *Crow Tribe* that his position is further compromised. With no access to state courts in most respects and with federal jurisdiction too limited, he is left again to his own devices. These are not the conditions that inspire a reliance on the law.

Certain complaints came to the author's attention during the course of his interviewing. If valid, these complaints would give credence to the notion that jurisdictional uncertainty has occasioned the rise of a "justice" system peculiar to the reservation. It is the kind of system bred by reservation economics, and it exists in spite of the law and in spite of the moral implications of the activities. Complaints were made that goods sold to reservation Indians are sometimes repossessed, once payments are defaulted, without permission of the Indian and without following applicable law. Complaints were made that some merchants and postal officials collaborate to withhold Indian welfare and payment checks as collateral for enforcing credit payments to the merchants. While some would undoubtedly dismiss these complaints as unfounded, others speak of them with authority and conviction.

The comment was made earlier that *Kennerly's* impact on this reservation is still unclear. The complaints that the author received were in reference to conditions that, for the most part, preceded *Kennerly*. This being the case, one would wonder about future prospects now that *Kennerly* further clouded the jurisdictional picture.

Because the question of state jurisdiction over Indian credit transactions has been resolved through *Kennerly* and *Crow Tribe*, and because access to the federal courts is limited, the tribal court stands as the only remaining alternative. Some Crow tribal members interviewed felt strongly about upgrading tribal courts but emphasized the need for a comprehensive public education program to accompany efforts in improving the court. Obviously this is a necessary first step. Confidence in this court is flagging at best. If the court is to be rebuilt, its prestige must likewise be rebuilt.

Those involved with the tribal court realize this is an ambitious project of long duration—perhaps twenty years—but getting non-Indians to recognize this court will be the crucial step. If the time to begin was ever right, it is now, and its immediacy is at least partly occasioned by *Kennerly* and *Crow Tribe*.

CONCLUSION

There is little question as to the serious impact that the *Kennerly* and *Crow Tribe* decisions have had in contribution to an already strained credit and lending situation on the reservation. What remains to be seen is whether the tribe can meet the challenge and make the necessary improvements in its court system. It is submitted that this endeavor, if publicly supported, might well contribute to a heightened sense of legal propriety for all concerned. In addition, it might contribute to a heightened sense of respect between creditor and debtor.